

Issue: Compliance – Grievance Procedure (5-Day Rule); Ruling Date: February 6, 2019; Ruling No. 2019-4843; Agency: Department of Corrections; Outcome: Grievant Not in Compliance.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**COMPLIANCE RULING**

In the matter of the Department of Corrections  
Ruling Number 2019-4843  
February 6, 2019

The Department of Corrections (the “agency”) has requested a compliance ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management in relation to the grievant’s May 18, 2018 grievance. The agency alleges that the grievant has failed to comply with the time limits set forth in the grievance procedure for advancing or concluding his grievance.

FACTS

On or about May 18, 2018, the grievant initiated a grievance with the agency. The second step meeting appears to have been held on October 11, 2018, and the second step response was sent by certified mail to the grievant on or about October 15, 2018. It appears that the certified mailing was not delivered to the grievant and eventually returned to the agency. If the second step response was delivered by other means to the grievant, evidence of the delivery was not presented to EEDR. Although it appears the grievant never received the second step response, the agency appears to have sent a brief e-mail to the grievant on December 3, 2018, which advised him that he had not advanced the grievance to the next level. The e-mail indicates that the grievant had five workdays “to get back into compliance with the grievance procedure.” The agency now seeks a compliance ruling allowing it to administratively close the grievance.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>1</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without EEDR’s involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>2</sup> If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EEDR, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. When an EEDR ruling finds that either party to a grievance is in noncompliance, the ruling will (i) order the noncomplying party to correct its

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<sup>1</sup> *Grievance Procedure Manual* § 6.3.

<sup>2</sup> *See id.*

noncompliance within a specified time period, and (ii) provide that if the noncompliance is not timely corrected, a decision in favor of the other party will be rendered on any qualifiable issue, unless the noncomplying party can show just cause for the delay in conforming to EEDR's order.<sup>3</sup>

Because there is no indication that the grievant ever received a copy of the second step response, there is not a basis to find that he is in noncompliance with the grievance procedure. Further, the brief notice of noncompliance sent by e-mail was non-instructive as to what steps the grievant needed to take. However, we are also cognizant that this grievance has essentially been dormant for months. If the grievant knows nothing about the second step response, from his perspective, he had the second step meeting on October 11, 2018, heard nothing, and has not followed up. Therefore, in the interest of expeditiously proceeding with this grievance, this ruling will serve as notice to the grievant that he needs to take action if he still wishes to pursue this grievance.<sup>4</sup>

Based on the above, EEDR orders the grievant to notify his human resources office in writing that he wishes either to conclude the grievance or proceed to the third step **within ten workdays of the date of this ruling**. If he does not, the agency may administratively close the grievance without any further action on its part. The grievance may be reopened only upon a timely showing by the grievant of just cause for the delay (for example, a serious illness, or other circumstances beyond the grievant's control).

EEDR's rulings on matters of compliance are final and nonappealable.<sup>5</sup>



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Director  
Office of Equal Employment and Dispute Resolution

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<sup>3</sup> While in cases of substantial noncompliance with procedural rules the grievance statutes grant EEDR the authority to render a decision on a qualifiable issue against a noncompliant party, EEDR favors having grievances decided on the merits rather than procedural violations. Thus, EEDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, EEDR will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.

<sup>4</sup> EEDR attempted to contact the grievant at the home number provided on his grievance form. We were unable to reach him or leave a message. However, if we had received a verbal indication from the grievant that he wished to proceed with the grievance, given the grievance record here, this ruling would have directed the agency to proceed to the third step of the grievance.

<sup>5</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).